Supreme Court, U.S.
FILED

97 933 DEC - 4 1997

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MASTER SERGEANT WILLIAM M. HAMILTON,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

Tishlyn Estelle Taylor
Captain, United States Air Force
Appellate Defense Division
Counsel of Record

Douglas H. Kohrt
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel for the Petitioner

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20332–8000
(202) 767–1562

November 1997

31 pp.

QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forced erred in finding that the appellant was not prejudiced by errors in the Staff Judge Advocate's Recommendation and Addendum thereto, including preparation of the Recommendation by trial counsel's spouse and erroneous advice in the Addendum to the effect that legal error is not an appropriate basis for corrective action by the convening authority.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASON FOR GRANTING THE WRIT 2

THE COURT OF APPEALS FOR THE ARMED FORCES ERRED IN FINDING THAT THE PETITIONER WAS NOT PREJUDICED BY ERRORS IN THE STAFF JUDGE ADVOCATE'S RECOMMENDATION AND ADDENDUM THERETO, INCLUDING PREPARATION OF THE RECOMMENDATION BY TRIAL COUNSEL'S SPOUSE AND ERRONEOUS ADVICE IN THE ADDENDUM TO THE EFFECT THAT LEGAL ERROR IS NOT AN APPROPRIATE BASIS FOR CORRECTIVE ACTION BY THE CONVENING AUTHORITY.

CONCLUSION 18a

APPENDIX A
(Opinion of the United States Court of Appeals for the Armed Forces) 1a

APPENDIX B
(Opinion of the United States Air Force Court of Criminal Appeals) 10a

TABLE OF AUTHORITIES

page

Military Cases:

United States v. Coulter, 3 U.S.C.M.A. 657, 14 C.M.R. 75 (1953) 6

United States v. Crunk, 4 U.S.C.M.A. 290, 15 C.M.R. 290 (1954) 4

United States v. Hightower, 5 U.S.C.M.A. 385, 18 C.M.R. 9(1955) 4

United States v. Kerwin, 47 M.J. 588 (A.F. Ct. Crim. App. 1996) 7

United States v. McCormick, 34 M.J. 752 (N.M.C.M.R. 1992) 3, 4, 5

United States v. Reed, 33 M.J. 98 (C.M.A. 1991) 6

United States v. Thompson, 3 M.J. 966 (N.M.C.M.R. 1977) 5

Federal Statutes:

28 U.S.C.A. 1259(3) (West Supp. 1996) 1

10 U.S.C.A. 867(a) (West Supp. 1996) 1

Article 6(c), Uniform Code of Military Justice (10 U.S.C. 806) 3

Rules for Courts-Martial

Rule for Courts-Martial 1106(b) 3

Rule for Courts-Martial 1105(b) 6

Rule for Courts-Martial 1107(b) 6

Rule for Courts-Martial 1106(a) 6

Rule for Courts-Martial 1106(d) 7

The petitioner, Master Sergeant William M. Hamilton, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in this case on 10 September 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces is not yet reported in an advance sheet or the Military Justice Reporter. The decision, No. 96-1407, __ M.J. __ (10 September 1997), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, ACM 31768 (A.F. Ct.Crim.App., 9 August 1996), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 10 September 1997. The jurisdiction of this Court is invoked under 28 U.S.C.A 1259 (3) (West Supp. 1996) and 10 U.S.C.A. 867 (a) (West Supp. 1996).

STATEMENT OF THE CASE

At the petitioner's general court-martial, he was convicted contrary to his pleas of voluntary manslaughter, in violation of Article 119, Uniform Code of Military Justice (10 U.S.C. 919). Petitioner was sentenced to a dishonorable discharge, confinement for 10 years, and reduction to the grade of E–1. After trial, Major LeEllen Coacher was the acting Staff Judge Advocate at the base legal office. Maj Coacher had participated in the pretrial preparation of the case, including acting as the government representative at the petitioner's pretrial confinement hearing. Additionally, it was Maj Coacher's spouse who ultimately prosecuted the case at

trial. Inspite of these facts, Maj Coacher drafted the Staff Judge Advocate's Recomendation (SJAR) to the convening authority. The record of trial was ultimately given to Major Steve Kenyon to review. However, Maj Coacher also gave him a copy of the SJAR she had already drafted. Maj Kenyon submitted this same SJAR without change, except for the signature block, to the convening authority. In his response to the SJAR, trial defense counsel alleged that it was error for Maj Coacher to have written the SJAR to the convening authority, and raised a number of other legal errors. During this time the new staff judge advocate for the Brooks AFB legal office arrived and he wrote the addendum responding to these allegations of error.

On appeal, both the Air Force Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces held that the petitioner was not prejudiced by any error that might have occurred in having a disqualified person draft the SJAR. The Air Force Court of Criminal Appeals also found no error in the advice given by the Staff Judge Advocate in the Addendum to the SJAR. The Court of Appeals for the Armed Forces conceded that the advice in the Addendum was arguably incomplete and misleading, but found that the petitioner was not prejudiced by any possibility that the convening authority was misled by this advice.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS FOR THE ARMED FORCES ERRED IN FINDING THAT THE PETITIONER WAS NOT PREJUDICED BY ERRORS IN THE STAFF JUDGE ADVOCATE'S RECOMMENDATION AND ADDENDUM THERETO, INCLUDING PREPARATION OF THE RECOMMENDATION BY TRIAL COUNSEL'S SPOUSE AND ERRONEOUS

ADVICE IN THE ADDENDUM TO THE EFFECT THAT LEGAL ERROR IS NOT AN APPROPRIATE BASIS FOR CORRECTIVE ACTION BY THE CONVENING AUTHORITY.

The SJA recommendation and addendum in this case were defective in two ways: (1) the SJA recommendation was prepared by Major LeEllen Coacher, who was a disqualified person under Article 6(c), UCMJ, and Rule for Courts-Martial (R.C.M.) 1106(b); and (2) the convening authority was given erroneous and misleading advice in the addendum which clearly suggested that legal errors are not an appropriate basis for corrective action by the convening authority.

Under Article 6(c), UCMJ, and R.C.M. 1106(b), a number of people are disqualified from acting as a staff judge advocate or legal officer to the convening authority on a given case. This list includes anyone who has acted as trial counsel or assistant trial counsel in that case. The discussion under R.C.M. 1106(b) also states that anyone with other than an official interest in the case should be precluded from acting as the staff judge advocate or legal officer in that case.

"Trial Counsel" as used in these provisions clearly extends beyond the person who represented the government at trial. In *U.S. v. McCormick*, 34 M.J. 752 (NMCMR 1992), the Navy-Marine Corps Court of Military Review held that a government counsel who had acted as trial counsel prior to the actual court-martial, was disqualified from drafting the post-trial advice to the convening authority. In that case the captain who was initially assigned to prosecute the case had been the point of contact for the victim's family; counseled the victim's family; escorted the victim and her family to the Naval Investigative Service; and provided his interview notes to his successor trial counsel. This same captain subsequently drafted the SJA recommendation, which recommended the sentence be approved as adjudged. The Navy-Marine Corps

Court of Military Review found that this level of involvement was enough to disqualify him under R.C.M 1106(b), even though the captain who drafted the SJA recommendation was taken off of the case prior to trial. *Id.* at 755.

Further, mere concurrence by a staff judge advocate in recommendations prepared by a disqualified person does not meet the requirement for an impartial review. *United States v. McCormick*, 34 M.J. at 755; *citing United States v. Hightower*, 5 USCMA 385, 18 CMR 9, 13 (1955). *See also United States v. Crunk*, 4 U.S.C.M.A. 290 15 C.M.R. 290 (1954). The staff judge advocate in *McCormick* actually signed the recommendation; and when trial defense counsel brought this issue up during post-trial review, a new staff judge advocate reviewed the case, but again submitted the original SJA recommendation with a new signature. *Id.* at 754. The Navy-Marine Court of Military Review held that merely having the SJA, or even two SJAs, review and sign the recommendation does not filter out the influence, or the appearance of influence, created by having a disqualified party draft the SJA recommendation. *Id.* at 756.

In the case *sub judice*, trial defense counsel's response to the SJA recommendation asserts that Maj Coacher was disqualified from acting as the SJA for two reasons: she was intricately involved with the government witnesses and trial preparation; and she is/was the spouse of the chief prosecutor at trial. The first of those two issues was never addressed. However, it is apparent from Maj Coacher's affidavit that she acted as the government representative at the pre-trial confinement hearing in this case. It is also apparent from the transcript of the pretrial confinement hearing that Maj Coacher was not simply acting as an impartial advisor to the confinement magistrate. Maj Coacher was advocating that the petitioner should be placed in confinement. While Maj Coacher passed off the case to another trial counsel for trial,

she was more than peripherally involved in this case prior to trial. Further, the person who acted as trial counsel at the actual court-martial is and was Maj Coacher's spouse. In drafting the SJA recommendation Maj Coacher was placed in the position of reviewing the actions of her own spouse in a contested case where there were numerous contested evidentiary issues. Though R.C.M. 1106(b) does not explicitly disqualify the trial counsel's spouse from preparing the SJA recommendation, this fact clearly put Maj Coacher in that class of people who have "other than an official interest" in the case.

Further, as in *McCormick, supra.*, merely having another person sign an SJA recommendation prepared by a disqualified person does dissipate the taint. Both Major Coacher, and Maj Kenyon agree in their affidavits that Maj Coacher originally prepared the SJA recommendation and that her draft was given to Maj Kenyon. According to the affidavit of Maj Kenyon, the SJA recommendation signed by Maj Coacher was in fact served in error on the appellant. A review of the draft SJA recommendation prepared by Maj Coacher and the final SJA recommendation signed by Maj Kenyon shows that Maj Kenyon made no changes to the draft given to him by Maj Coacher. Maj Kenyon states in his affidavit that he "adopted Maj Coacher's recommendations only after careful review and consideration of the record of trial." However, in the final analysis, Maj Kenyon put his signature to Maj Coacher's work; and the disqualification attaches to the work not the signature. *United States v. McCormick,* 34 M.J. at 755; *citing United States v. Thompson,* 3 M.J. 966, 968 (N.C.M.R. 1977), *rev'd on other grounds,* 6 M.J. 106.

The Court of Appeals for the Armed Forces found no prejudice in having a disqualified person draft the SJAR in this case. However, in looking at Article 6, UCMJ, in the past, the Court of Appeals for the Armed Forces has stated:

> The obvious purpose of the lawmakers in prohibiting trial counsel from subsequently acting as the Staff Judge Advocate on the review of the same case was to assure the accused a thoroughly fair and impartial review.

Crunk, supra; quoting *United States v. Coulter,* 3 U.S.C.M.A. 657 14 C.M.R.75. It can never be known with certainty whether an impartial review might have produced a different recommendation. However, the petitioner was prejudiced in that he was denied the chance to ever have the impartial review of his case promised under Article 6 of the UCMJ.

The Addendum to the SJA recommendation was also defective because it implied that legal errors are not an appropriate basis for corrective action by the convening authority. R.C.M. 1105(b)(1) clearly states that the accused may submit allegations of errors affecting the legality of the findings or sentence. While R.C.M. 1107(b) states that the convening authority is not required to review the case for legal errors, that rule is equally clear that the convening authority must consider any matters submitted by the accused under R.C.M. 1105. The discussion under R.C.M. 1107(b)(1) also notes that, if the convening authority notices any errors, the convening authority may take corrective action under this rule. Indeed, the Court of Appeals for the Armed Forces has stated that it is entirely appropriate for a convening authority to attempt to cure such errors before the case reaches the appellate level. *United States v. Reed,* 33 M.J. 98, 99 (C.M.A. 1991).

In addition, before a convening authority takes action under R.C.M. 1107 on a general court-martial, the convening authority's staff judge advocate or legal officer must forward their recommendations to the convening authority, R.C.M. 1106(a); and, when a legal error is alleged, those recommendations must state whether, in the staff judge

advocate's opinion, corrective action on the findings or sentence is appropriate, R.C.M. 1106 (d)(4). Further, the staff judge advocate's advice on such corrective action is entirely separate from whether the convening authority should grant clemency. *United States v. Kerwin*, 46 M.J. 588 (A.F.Ct. Crim.App. 1996).

In this case, the appellant alleged six legal errors in the court-martial proceedings. The SJA discusses these errors in paragraph 5 of the Addendum to the SJA recommendation, dated 1 August 1995. The SJA begins by noting that the convening authority is not required to review the case for legal errors, but may take corrective action. However, the SJA then disposed of three of the legal errors alleged by advising the convening authority as follows: "Evidentiary rulings do not fall under the province of the convening authority, but are matters properly brought before the Military Judge, as was done in this case on this issue. Unfavorable rulings are issues for appeal rather than reasons for granting clemency." (Addendum paragraphs 5c, d, and e).

In disposing of the issues this way, the staff judge advocate failed to express either "agreement or disagreement with the matter raised by the accused" as required by R.C.M. 1106(d)(4), and, more importantly, provided misleading and inaccurate advice to the convening authority. This advice confused the distinction between taking corrective action for legal errors and clemency, and implied that the convening authority did not have the authority to take corrective action with respect to these legal errors. Thus, the SJA's addendum erroneously, and prejudicially, invited the convening authority to abrogate his responsibility to consider the legal errors raised by the appellant as a basis for corrective action.

Conclusion

For the foregoing reasons, this Honorable Court should reverse the decision of the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces in this case. Petitioner respectfully submits the Court of Appeals for the Armed Forces and the Air Force Court of Criminal appeals erred in finding that the petitioner was not prejudiced by the above errors in the Staff Judge Advocate's Recommendation and Addendum.

WHEREFORE, petitioner requests that this writ be granted.

Respectfully submitted,

TISHLYN E. TAYLOR
Captain, United States Air Force
Appellate Defense Division
Counsel of Record

DOUGLAS H. KOHRT
Colonel, United States Air Force
Appellate Defense Division
Counsel for the Petitioner

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
(202) 767-1562

APPENDIX A

United States, Appellee

v.

William M. HAMILTON, Jr., Master Sergeant
U. S. Air Force, Appellant

No. 96–1407

Crim.App. No. 31768

United States Court of Appeals for the Armed Forces

Argued June 4, 1997

Decided September 10, 1997

Counsel

For Appellant: *Captain Tishlyn Taylor* (argued); *Lieutenant Colonel Kim L. Sheffield* and Captain *Harold M. Vaught* (on brief); *Colonel David W. Madsen* and *Lieutenant Colonel Charles L. Carpenter, Jr.*, USAFR.

For Appellee: *Lieutenant Colonel Michael J. Breslin* (argued); *Captain Libby A. Brown* (on brief).

Military Judge: Michael B. McShane

Tried at Kelly and Lackland Air Force Bases, Texas

Opinion of the Court

EFFRON, Judge:

Following a trial by officer and enlisted members sitting as a general court-martial on a specification alleging premeditated murder of his estranged wife, appellant was

convicted of voluntary manslaughter. *See* Arts. 118 and 119, Uniform Code of Military Justice, 10 USC §§ 918 and 919, respectively. He was sentenced to a dishonorable discharge, confinement for 10 years, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Court of Criminal Appeals affirmed in an unpublished opinion. On appellant's petition, we granted review of the following issue:

> WHETHER ERRORS IN THE SJA'S [STAFF JUDGE ADVOCATE'S] RECOMMENDATION AND ADDENDUM THERETO (INCLUDING PREPARATION OF THE RECOMMENDATION BY TRIAL COUNSEL'S SPOUSE AND ERRONEOUS ADVICE IN THE ADDENDUM TO THE EFFECT THAT LEGAL ERROR IS NOT AN APPROPRIATE BASIS FOR CORRECTIVE ACTION BY THE CONVENING AUTHORITY) NECESSITATE A NEW CONVENING AUTHORITY ACTION OR OTHER APPROPRIATE RELIEF.

For the reasons discussed below, we hold that a new recommendation and action is not required.

I. Background

Prior to trial, Major (Maj) C represented the SJA's office in the negotiations with local civilian officials that resulted in military jurisdiction over the prosecution of this case. She also represented the Government at a hearing concerning pretrial confinement of appellant. Subsequently, she was designated as the Acting SJA for the command.

Following appellant's trial, Maj C prepared a draft post-trial recommendation to the convening authority. *See* Art. 60(d), UCMJ, 10 USC § 860(d) (1983); RCM 1106, Manual

for Courts-Martial, United States (1995 ed.). Prior to transmitting the recommendation, however, she decided to undertake research and consultation on the question whether she should transfer responsibility for preparing the recommendation to another attorney. She primarily was concerned about the fact that her husband had been trial counsel at appellant's court-martial.

Subsequently, she decided to transfer responsibility for the post-trial recommendation to another attorney in order to avoid any appearance of bias. Because she was scheduled to be away from her office during the following week for temporary duty, she asked Maj K—who would be Acting SJA in her stead—to take responsibility in her absence.

Maj K prepared a recommendation and served it on appellant. *See* Art. 60(d); RCM 1106(f)(1). Apparently as a result of administrative inadvertence, Maj C's draft recommendation also was served on appellant. After examining the two versions, appellant's defense counsel observed that they nearly were identical.

Subsequently, a new SJA, Lieutenant Colonel (LtCol) W. was assigned to the command, and defense counsel submitted a document to him that responded to the recommendation that had been prepared by Maj K. *See* RCM 1106(f)(4). Defense counsel challenged Maj C's role in writing the recommendation, arguing, "There is a definite appearance of impropriety and probable bias in having the wife of the Chief Prosecutor of MSgt Hamilton write the advice and recommendation to the convening authority." Furthermore, defense counsel pointed out that Maj C had been "intricately involved with the government witnesses and trial preparation" as the "Chief of Military Justice" prior to the trial. Defense counsel acknowledged that Maj K also had written a recommendation, but noted that it was the "*very same* recommendation" that had been written by Maj C, simply

with someone else's signature. In addition to this issue, defense counsel alleged that five separate legal errors had occurred at trial.

LtCol W prepared an addendum to the recommendation, *see* RCM 1106(f)(7), in which he addressed the six legal issues that had been raised in defense counsel's response. He "remind[ed]" the convening authority that he was "not required to review the case for legal errors or factual sufficiency, but . . . [could] take corrective action." With respect to three of the issues, which concerned admissibility of evidence, he advised the convening authority in each instance as follows:

> Evidentiary rulings do not fall under the province of the convening authority, but are matters properly brought before the [military judge], as was done in this case on this issue. Unfavorable rulings are issues for appeal rather than reasons for granting of clemency.

As to the issue of Maj C's role in preparing the recommendation, LtCol W provided the following advice to the convening authority:

> Another SJA's Recommendation was prepared and signed by Maj [K], Acting Staff Judge Advocate. Before signing the Recommendation, Maj [K] reviewed the recommendation and the ROT [record of trial] and concluded that the sentence should be imposed as adjudged. He was in no way obligated to reach the same conclusion that Maj [C] did, but could have changed the recommendation had he seen fit to do so. His independent review of the ROT and the SJA's Recommendation prior to signing it cleanses any possible taint and renders the SJA's Recommendation proper for your consideration.

II. Discussion

Appellant contends that the

> SJA recommendation and addendum . . . were defective in two ways: (1) the SJA recommendation was prepared by Maj [C], who was a disqualified person under Article 6(c), UCMJ, and RCM 1106(b); and (2) the convening authority was given erroneous and misleading advice in the addendum which clearly suggested that legal errors are not an appropriate basis for corrective action by the convening authority.

Final Brief at 2.

A. Disqualification of Maj C

Appellant contends that, because the recommendation submitted by Maj K to the convening authority was the draft written by Maj C, any disqualification of Maj C extends to use of her work-product by another attorney in the same office. *See United States v. Hightower,* 5 USCMA 385, 389, 18 CMR 9, 13 (1955).

Appellant makes two distinct arguments in support of his predicate claim that Maj C was disqualified from writing the post-trial recommendation. First, he points to the language in Article 6(c), UCMJ, 10 USC § 806(c), and in RCM 1106(b) that disqualifies the "trial counsel" in a case from acting later as the staff judge advocate to the convening authority in the same case. He urges that "trial counsel" extends beyond the person who prosecutes in the name of the United States in the courtroom and includes all persons who act on behalf of the United States prior to trial. Final Brief at 3.

Second, appellant argues that Maj C "was placed in the position of reviewing the actions of her own spouse in a contested case where there were numerous contested

evidentiary issues." *Id.* at 4. While Article 6(c) and RCM 1106(b) do not disqualify a trial counsel's spouse expressly, appellant contends that the reviewing spouse is someone who has "other than an official interest" in the case when she must review the prosecution's trial performance. *Id.*; see RCM 1106(b), Discussion; *see generally United States v. Rice*, 33 MJ 451, 45253 (CMA 1991)(Government sentencing witness disqualified from writing post-trial recommendation).

Under the circumstances of this case, we need not decide whether Maj C was disqualified, because Maj C's actions relating to the SJA's recommendation to the convening authority did not materially prejudice the substantial rights of appellant. *See* Art. 59(a), UCMJ, 10 USC § 859(a). After Maj C had drafted her recommendation, she realized that she might have a conflict or an appearance of one in fulfilling that responsibility. Consequently, she delegated that duty to the next most senior officer, to be performed while she was absent from the installation.

Although Maj C's draft and Maj K's recommendation to the convening authority virtually are identical, appellant has failed to demonstrate that the text of the recommendation prejudiced his opportunity to receive relief from the convening authority. The entries on the first page of the recommendation repeat routine administrative boilerplate. The content of the following one and one half pages of text—which includes matters such as a list of appellant's awards and decorations, a short discussion of the purpose of the SJA's recommendation, a statement that the evidence was legally sufficient, a statement that there were no legal errors, and a brief recital of additional background information on appellant—is bland and unremarkable.

We note that the only discussion of any substantive issue in controversy did not occur in the initial recommendation submitted by Maj K but in the subsequent addendum written

by LtCol W. the new SJA. Appellant does not claim that Maj C played any role in the preparation of LtCol W's addendum. In this unusual context, Maj K's borrowing of Maj C's recommendation, which was plain-vanilla in substance, did not prejudice appellant, and appellant has not made any specific representation in this Court to the contrary. *Cf. United States v. Craig,* 28 MJ 321, 324–25 (CMA 1989)(remand usually in order when SJA does not comply with RCM 1106 or when record is unclear whether convening authority considered clemency materials).

B. Advice on Convening Authority's Review of Legal Issues

Appellant contends that the addendum to the recommendation, written by LtCol W. "clearly suggested [incorrectly] that legal errors are not an appropriate basis for corrective action by the convening authority." Final Brief at 2. Although we do not agree that such a suggestion "clearly" was made, we recognize that the SJA's advice, as a whole, is ambiguous in this regard.

The SJA began his discussion of appellant's contention of legal error by informing the convening authority that he was "not required to review the case for legal error," but that he could "take corrective action." In his ensuing discussion of the legal issues raised by appellant, however, the SJA seemed to muddy the water. His advice as to three of those issues—that "[e]videntiary rulings do not fall under the province of the convening authority" and that "[u]nfavorable rulings are issues for appeal rather than reasons for granting clemency"—arguably is incomplete to the extent that it implies that such matters are of no proper concern to the convening authority. That implication, if made, would be incorrect because a convening authority statutorily may take action in a case "only after consideration of any matters submitted by the accused. . . ." Art. 60(c)(2).

Notwithstanding the mandate to consider defense submissions, it is clear that the convening authority's power "to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority." Art. 60(c)(1). As a matter of command prerogative, "[t]he convening authority is not required to review the case for legal errors or factual sufficiency." RCM 1107(b)(1).

In matters of clemency, the convening authority's obligation to consider defense submissions is uniquely critical to an accused. This Court often has observed that the convening authority is an accused's last best hope for clemency. *See United States v. Cook,* 46 MJ 37, 39 (1997). Clemency is the heart of the convening authority's responsibility at that stage of a case. If an SJA gives faulty advice in this regard, the impact is particularly serious because no subsequent authority adequately can fix that mistake.

In contrast, the convening authority's statutory role vis-a-vis defense claims of legal error is less pivotal to an accused's ultimate interests. Although an SJA must respond to a defense claim of legal error, *see Craig,* 28 MJ at 324, "[t]he response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required." RCM 1106(d)(4).

Thus, while a convening authority has the power to respond remedially to an accused's claim of legal error and while he is encouraged to act in the interest of fairness to the accused and efficiency of the system, he is not required to do so. Unlike the lost opportunity occasioned by defective SJA advice on matters of clemency, erroneous advice by an SJA as to a claim of legal error that leads a convening authority not to afford relief to an accused can be corrected by appellate litigation of the claimed error.

It is appropriate in this context for an appellate court to look for prejudice that might have flowed from misadvice as to a defense claim of legal error. *See United States v. Welker*, 44 MJ 85 (1996). We find none. While appellant has pursued on appeal some of the claims of legal error that he raised in his response to the SJA recommendation, neither the Court of Criminal Appeals nor this Court has considered any of these issues to be meritorious. Even if the originally ambiguous advice from the SJA might have misled the convening authority with respect to his power to correct legal errors, the absence of any such errors precludes a finding that the SJA's advice prejudiced appellant.

III

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges SULLIVAN, CRAWFORD, and GIERKE concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEAL

UNITED STATES

v.

Master Sergeant WILLIAM M. HAMILTON, JR.,
FR 155–48–1042
United States Air Force

ACM 31768

9 August 1996

Sentence adjudged 21 April 199S by GCM convened at Brooks Air Force Base, Texas. Military Judge: Michael B. McShane.

Approved sentence: Dishonorable discharge. confinement for 10 years, and reduction to E–1.

Appellate Counsel for Appellant: Colonel Jay L Cohen and Captain Harold M. Vaught.

Appellate Counsel for the United States: Lieutenant Colonel Michael I. Breslin.

Before

DIXON, SCHREIER and STARR
Appellate Military Judge

OPINION OF THE COURT

SCHREIER, Senior Judge:

This began as a capital murder case . Ultimately, members convicted appellant of voluntary manslaughter in

the stabbing death of his wife, Sharon, and sentenced him to a dishonorable discharge, confinement for 10 years, and a reduction to E–l. Appellant asserts four assignment of error involving the admissibility of evidence, unfair prejudice by including in the record of trial the members' comments after sentence was announced, and errors in the Staff Judge Advocate Recommendation (SJAR). Finding no prejudicial error, we affirm

FACTS

Appellant and his wife had a tumultuous relationship, having separated at least twice over the course of a brief marriage. At the time of his wife's death, they were living apart. The chain of events leading to her death began on Friday, July 8th, 1994. During late afternoon, appellant and his wife had a fight which was witnessed by Mechelle Hensley, a neighbor, who called the police. Appellant left the scene before the police arrived. He testified that he was afraid the police would arrest him, so he took measures to allow time for the situation to defuse. He left his car at the airport and rented another vehicle for the weekend.

When appellant went to work on Monday morning, he told his supervisor that he had a fight with his wife over the weekend and he contacted Family Advocacy for an appointment. Later that morning, he received a call from his wife. He claimed she told him that there was a warrant for his arrest and that Kevin Adair, the father of one of her children. was looking for him. Shortly thereafter, he left work and engaged in a series of actions apparently intending to avoid detection by the police or Mr. Adair. He took all the money out of the bank account and placed it under the floormat of his car; he rented another car; and he purchased some clothes, "Mace," sleeping pills, and a fishing knife. Appellant testified

to conflicting emotions ranging from concealing himself, to trying to get back together with his wife, to killing himself.

Later that day, he observed his wife picking up the children from child care. He went to her apartment complex, parked his rental van around the side, and waited for her by the mailbox. He testified that he approached her and asked her if they could work it out. When she replied "no," be asked who was in the car waiting for her. He alleged that she replied "my lover," and he went into a rage. The next thing he realized, the knife was in his hand and he saw blood on it. Sharon received eight stab wounds to her chest, arm, groin area, abdomen, and neck. During emergency surgery, she died.

IMPEACHMENT OF AN ACCUSED

During an Article 39(a) session following arraignment, defense counsel moved to exclude evidence relating to nine separate incidents or reports of uncharged misconduct. The trial counsel stated that he only intended to introduce evidence of the July 8th uncharged misconduct incident on the merits. However, trial counsel indicated that information concerning the other misconduct may be introduced through the cross-examination of defense witnesses or in rebuttal. The military judge did not rule on eight of the nine incidents of uncharged misconduct but advised trial counsel to litigate the admissibility of matters if they decided to offer the uncharged misconduct.

Appellant testified on the merits. On direct examination he stated that he was going to tell the truth and except for an Article 15 for a false official statement he had not gotten into trouble for lying during his career. On cross-examination appellant was questioned extensively about his truthfulness. He admitted to lying in the past but denied lying in his testimony. Trial counsel then asked the following series of questions:

Q. Now, you have lied before concerning your relationship with Sharon when you thought you were in trouble, haven't you?

A. No. sir

Q. Well do you recall an incident in June 1993 when the police were called to your house?

A. Yes. sir.

Q. Sharon had reported to them that you had a gun and were threatening her with that gun, isn't that time?

A. Yes, sir.

Q. And they came out and they asked you if you had a gun, didn't they?

A. Yes, sir.

Q. And you told them no.

A. Initially, I did, yes, sir.

Q. You told him no; isn't that true?

A. Initially.

Q. And they actually found the gun, didn't they?

A. I told them where the gun was.

Q. I want to get this straight because Officer Sims is going to be in here, and you are telling us that you told them before they found the gun that you had a gun?

A. I told him where the gun was, yes, sir.

Q. And so if this San Antonio police officer comes in here and says something different

DC. Objection, Your Honor.

Q. —he would be lying?

MJ. I'm sorry: Objection? Argumentative? Probably so. Sustained.

On rebuttal, Officer Sims testified that appellant denied having a gun in the house. He stated that they found a weapon in the bedroom. Defense made no objection to the testimony. During an Article 39(a) session on findings instructions, the military judge asked whether the defense wanted an instruction on the issue of uncharged misconduct and the alleged lying to the policeman. The defense specifically waived any instructions in this area.

Appellant now alleges that the trial counsel attempted to smuggle this inadmissible evidence of uncharged misconduct before the members in the guise of impeachment evidence. Appellant urges that the evidence is not admissible under MIL.R. EVID. 404(b). Furthermore, because the trial counsel elicited this alleged lie from the appellant, he cannot then bootstrap otherwise inadmissible evidence into impeachment evidence. *United States v. Maxwell,* 21 M.1. 229, 230 (C.M.A. 1986). Finally, appellant argues that the earlier motion *in liming* preserved the issue and counsel's failure to object don ant constitute waiver.

We'll-deal with appellant's latter claim first. A party objecting to the admissibility of certain evidence must make a timely objection to that evidence and state the specific grounds for the objection if the specific grounds are not evident from the surrounding circumstances. MIL.R.EVID. 103(a)(1). Failure to makes a timely, specific objection waives the issue for appeal, absent plain error. *See United States v. Akers,* 14 M J. 768 (A.C.M.R. 1982). Standing alone a motion *in limine* may not preserve an objection for appeal. *United States v. Johnson,* 35 M.J.17 (C.M.A. 1992) (expert testimony in child sex abuse case). Once a judge has limited the scope of testimony, it is incumbent for the defense to protest violations of that ruling. *United States v. Johnson,* 35 M.J. at 21. But, if the ruling of the military judge is intended to be final then a subsequent objection is not necessary at the

time the evidence is offered to preserve the issue. *United States v. Gamble*, 27 MJ. 298, 307 (C.M.A. 1988).

An accused who testifies opens the door to his or her character for truthfulness. *United States v. Pruitt*, 43 MJ. 864, 868 (A.F.Ct.Crim.App. 1996). Additionally, counsel may attack or support the credibility of a witness by inquiring into specific instances of conduct on cross-examination. Normally, counsel is bound by the witness's answer and may not introduce extrinsic evidence to prove the conduct. MIL.R.EVID. 608(b). However, counsel may introduce extrinsic evidence to contradict the witness who denies committing certain misconduct on direct examination or gratuitously volunteers information in response to a narrow cross-examination. *United States v. Trimper*, 28 M.J. 460, 466–67 (C.M.A. 1989), *cert. denied*, 493 U.S. 96S (1989).

Appellant's credibility was at the heart of his denial of premeditated murder. Additionally, the appellant's alleged lie to the police officer concerning his possession of a gun was fully described in the police report. Defense counsel knew this information and must have anticipated that it could be used to impeach appellant's testimony. Yet, the initial motion focused on the use of uncharged misconduct as substantive evidence and not on its use as impeachment. Indeed, trial counsel specifically warned the defense that the uncharged misconduct might be used in cross-examination or rebuttal.

If defense counsel believed the evidence was inadmissible, it was incumbent on them to ensure that any potentially inadmissible evidence did not come before the fact-finder. Following the appellant's direct examination, defense counsel could have requested an Article 39(a) session to renew their objection to the uncharged misconduct or they could have objected at any point during trial counsel's series of questions. The potentially most damaging part of appellant's testimony was his alleged lie indicating he told the

officer the location of the gun. This statement was in response to the seventh question in this series of questions.

We further reject appellant's argument that the defense counsel made a strategic choice not to object in front of the members. This argument is undercut by counsel's subsequent objection to an argumentative question in this same series of question and the opportunities to request an Article 39(a) session. We also reject appellant's argument that the trial counsel went beyond the limits of the judge's ruling in introducing evidence of uncharged misconduct. *See Johnson,* 35 M.J. at 21. Moreover, in a case where it appears that counsel is going beyond the bounds of the military judge's ruling, it would appear even more critical for opposing counsel to restate their objection. We find that appellant has waived appellate review of this issue by failing to make a timely objection at trial. MIL.R.EVID. 103(a)(1), RC.M. 905(e).

We have further considered whether the military judge committed plain error in failing to *sua sponte* stop this line of questioning. Plain error involving error that is both obvious and has a prejudicial impact on the proceedings. *United States v. Fisher,* 21 M.J. 327 (C.M.A. 1986). First, the error, if any, in this case is not obvious. In fact we believe that a persuasive argument can be made for the admissibility of the alleged lie to the police officer. *See Trimper,* 28 M.J. at 466–467. Next, defense specifically waived any limiting instruction in this area. Finally, we have carefully considered the entire record in both findings and sentencing. We are convinced that this information did not have a prejudicial impact on the outcome. Article 59(a).

VICTIM IMPACT TESTIMONY

The defense counsel made a motion in limine to prevent trial counsel from offering numerous categories of evidence

including "victim impact and other inflammatory and ,convening authority. Rather, the common practice is to hold the SJAR until the accused and counsel have had the opportunity to submit any corrections or rebuttal to the SJAR R.C.M. 1106(f)(1) and (4). Here, any error was corrected before the SJAR and attachments were sent to the convening authority, the potential conflict was raised in the defense response to the SJAR, and the addendum commented on it. We are convinced that the convening authority received the benefit of an impartial SJAR prepared by Major Kenson, then the acting SJA. There was no error.

The affidavits of the convening authority and the SJA further convince us that the convening authority considered the defense submissions before taking action on the case. *See United States v. Foy,* 30 M.J. 664 (A.F.C.M.R. 1990) (*en banc*); *United States v. Blanch,* 29 M.J. 672 (A.F.C.M.R.1989) We reject appellant's claim that the SJA failed to state whether corrective action should be taken on the alleged legal errors. We find that the SJA's addendum clearly indicated disagreement with the alleged legal errors. In fact, the addendum went beyond the requirements of R.C.M. 1106(d)(4) by analyzing the alleged errors. Likewise, the SJA's advice to the convening authority concerning legal errors was not erroneous.

INCLUSION OF COURT MEMBERS' COMMENTS IN RECORD OF TRIAL

After announcing the sentence, the president of the court-martial read a statement into the record of trial expressing the members' belief that panels should know the maximum penalty for each offense before they make findings. The statement further expressed their wish that appellant's pay be used solely for the support of his dependents. The SJAR did not mention these comments. However, the defense

response to the SJAR alleged inclusion of the first comment constituted error. The addendum then discussed the alleged error. Appellant now alleges that the inclusion of these comments in the record of trial and the discussion in the addendum tainted the convening authority's action and precluded clemency. Appellant further requests that the comments and the exhibit be expunged from the record of trial.

It is not uncommon for court members to make a recommendation for clemency after the announcement of the sentence or by separate written communication. *See United States v. Weatherspoon*, ___ M.J. ___, (July 30, 1996) (the Court recognizes the power of a court-martial to recommend clemency to the convening authority contemporaneously with the sentence). As in all facets of the trial, the military judge is ultimately responsible for ensuring a fair and orderly proceedings. Allowing the members to place a statement on the record after the announcement of sentence is a matter within the discretion of the military judge. We find the military judge did not abuse his discretion in allowing the members to express their desire to know the maximum punishment earlier in the case.

Furthermore. it was the actions of defense counsel which highlighted these comments to the convening authority. The government's response was appropriate. Moreover, appellant has cited no authority which allows us to delete information from a record of trial. Finally, we are persuaded that the inclusion of these comments did not prejudice appellant's opportunity for clemency. Article 59(a).

CONCLUSION

We conclude that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error

prejudicial to appellant's substantial rights occurred. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Chief Judge DIXON and Judge STARR concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court